No. 89-1520

In The

Supreme Court of the United States

October Term, 1989

COOK INLET TRIBAL COUNCIL,
C.A.A. and C.M.F.,
A Tribal Indian Mother
and Her Minor Child,

Petitioners,

v.

CATHOLIC SOCIAL SERVICES, INC.,
C.G. and S.G.,

Respondents.

BRIEF OF RESPONDENTS CATHOLIC SOCIAL SERVICES, INC., C.G. and S.G. IN OPPOSITION TO PETITION FOR CERTIORARI

ROBERT B. FLINT
HARTIG, RHODES, NORMAN,
MAHONEY & EDWARDS

717 K Street
Anchorage, Alaska 99501
(907) 276-1592

Attorneys for
Respondents
Catholic Social Services, Inc.,
C.G. and S.G.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Is notice to the tribe in voluntary adoptions required under the Indian Child Welfare Act?

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COUNTER-STATEMENT OF THE CASE

Respondents, Catholic Social Services, Inc. ("CSS") and C.G. and S.G., accept the Statement of the Case supplied by Petitioner with the following exceptions:

1. "...Most (if not all) of these [Native American] children have been permanently placed with non-indian families." Pet., p. 3. In fact, although there are placements with Indian families, the racial mix of adoptive parents cannot be determined since CSS keeps no such racial records. Glaser Depo., Vol. 2, p. 49.

2. "[CSS] encouraged C.A.A. to next give up custody of her second child . . .. C.A.A. was reluctant to do so. When in June, 1986 C.A.A. finally agreed, [CSS] began a procedure which . . . was

effectively designed to keep her from being able to change her mind." Pet., pp. 3-4. CSS discussed many options with C.A.A. The decision to relinquish was requested by her and was completely her own decision, without suggestion or coercion of any kind. Glaser Depo., Vol. 1, pp. 28-29, 55-56, 63, 67, 70, 77-78 and 92.

3. "At the hearing C.A.A. was told she would only have ten days to reconsider her decision. . ." Pet., p. 4. The ten-day reconsideration period provided by state law was explained to C.A.A. She was informed that after that time the court would sign a decree of termination and that after that decree she could not change her mind. Hearing Trans., p. 8. A motion to revoke the relinquishment on these grounds was denied by the Anchorage Superior Court on April 6, 1990.

4. "Among the conditions imposed by [CSS] prior to and at the hearing was that C.A.A. retain physical custody of her daughter throughout this period. [CSS] was clearly concerned that C.A.A. would change her mind if she had to physically give up her . . . child before the decree became final." Pet., p. 4. CSS did not have a foster home available at the time C.A.A. decided to relinquish. After discussion of the options with C.A.A., which included state foster care, it was decided to leave CMF with C.A.A., a time period which C.A.A. used as good time to be remembered with CMF. Glaser Depo., Vol. 1, pp. 82-85, 87-90.

5. "Although C.A.A. advised [CSS] she was indifferent to her family learning of the relinquishment proceedings, neither the extended Indian family nor the Cook Inlet Tribal Council were notified that the proceedings were underway." Pet., p.

5. C.A.A. specifically requested that the Tribe and family not be contacted. Glaser Depo., Vol. 1, pp. 35, 69-70, 97, 154, 157.

6. "Nor did Catholic Services inform C.A.A. of the existence of Cook Inlet Tribal Council's array of programs and support services designed to assist Indian women and mothers like C.A.A. These were standard Catholic Services practices." Pet., p. 5. C.A.A. was given many referrals, including a residential substance abuse program and AA. She knew about Cook Inlet, but did not want them to be involved. She was also advised that she could retain her own attorney (Glaser depo., Vol. 1, pp. 177-178), which CSS would pay for. Glaser Depo., Vol. 1, p. 59. The dissent in the Alaska Supreme Court mistakenly asserted that CSS did not inform C.A.A. that she could be represented by her attorney. This false

impression had been created by the Brief of Cook Inlet Tribal Council and C.A.A. Due to ill health, Justice Robinowitz was not present during oral argument when this impression was corrected.

SUMMARY OF ARGUMENT

Section 1913 of the Indian Child Welfare Act does not require notice in voluntary adoption cases. The decision of Congress to protect the privacy of Indian parents in a statute does not violate due process. Mississippi Band of Choctaw Indians does not apply.

ARGUMENT

I

ALASKA SUPREME COURT DECISION DOES NOT CONFLICT WITH MISSISSIPPI CHOCTAW DECISION

Mississippi Band of Choctaw Indians v. Holyfield, _____ U.S. _____, 109 S.Ct. 1597 (1989) was a case involving

the exclusive jurisdiction of a tribal court under 25 U.S.C. 1911 (a) over the adoption of Indian children who were held to be domiciliaries of the Tribe. The scope of the case was set out by the Court itself:

> Because of the centrality of the exclusive tribal jurisdiction provision to the overall scheme of the ICWA, as well as the conflict between this decision of the Mississippi Supreme Court and those of several other state courts, we granted plenary review.
>
> . . .
>
> The sole issue in this case is, as the Supreme Court of Mississippi recognized, whether the twins were domiciled on the reservation.

There is no dispute about jurisdiction in the instant case. There are no tribal courts and C.A.A. has never lived on a reservation. In fact, she was born in Anchorage, grew up there and in the nearby Matanuska-Susitna Valley, and

at the time she contacted Catholic Social Services was a secretary with the State of Alaska in Anchorage. There is no dispute that the State Court has jurisdiction over the proceeding. Thus, § 1911(a) has no application and Mississippi Choctaw cannot be in conflict.

ARGUMENT

II

INDIAN CHILD WELFARE ACT IS CLEAR ON NOTICE

The per curiam opinion of the Alaska Supreme Court states at the very beginning that the only issue presented is whether the Act requires notice to an Indian Tribe in the matter of a voluntary termination of parental rights. While the court commented on intervention, that issue is not in question here. The lower court granted intervention to the Tribe, a decision which was not appealed.

The relinquishment of parental rights was initiated by C.A.A. It was a voluntary proceeding taken before the Court according to 25 U.S.C. 1913, which governs the voluntary termination of parental rights to Indian children. C.A.A. had requested that no notice be given to the Tribe, a request honored by Catholic Social Services. Such notice is required in involuntary terminations by 25 U.S.C. 1912(a):

> In an involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right to intervention...(emphasis added).

Section 1913, in contrast, makes no reference whatsoever to notice to the tribe or to intervention.

The structure of these two succeeding sections makes it impossible to conclude that Congress intended to create a right to notice in § 1913. Section 1912 is explicit on the subject, right down to the language "return receipt requested"; § 1913 is absolutely silent. If Congress had intended that § 1913 proceedings should not go forward until the Indian child's tribe was notified, the Act would have made that clear.

Any argument that the right to notice can be read into § 1913 directly from § 1912 is equally strained. It is clear from their substance that § 1912 refers only to involuntary proceedings and § 1913 only to voluntary ones. Matter of J.R.S., 690 P.2d 10, 13 (Alaska 1984); D.E.D. v. State, 704 P.2d 774, 781 (Alaska 1985); Duncan v. Wiley, 657 P.2d 1212, 1213 (Okla. App. 1982). The Alaska Supreme Court correctly concluded that the Act

does not require notice to the tribe in voluntary termination proceedings. Any other conclusion strains the language of the two sections past the breaking point.

The legislative history of the Indian Child Welfare Act confirms the statutory interpretation that notice to the tribe is not required in voluntary proceedings. In the original proposed legislation, all custody proceedings were grouped into a single definition of "child placement." S. 1214, 95th Cong., 2d Sess. § 4(h) (1977); Proposed Indian Child Welfare Act: Hearing on S. 12134 before the Senate Select Committee on Indian Affairs, 95th Cong., 2d Sess. 129 (1977). The original legislation gave the tribe the right to notice and intervention in all child placements. S. 1214 at § 102(c). Subsequent testimony indicated dissatisfaction with the general term "child placement":

> Title One is also unclear in its use of the term "child placement." Child placement according to the definition in section 4(h) includes any private action under which the parental rights of the parent . . . are impaired . . .. The definition of the term child placements remains unclear and the difficulty it has caused in discussion of this bill will be multiplied in the enforcement of the bill.

Indian Child Welfare Act: Hearings on S. 12134 before the House Subcommittee on Indian Affairs and Public Lands of the Committee on Interior and Insular Affairs, 95th Cong., 2d Sess. 175 (1978) (Statement of Rich Lavis, Assistant Secretary of Indian Affairs).

Subsequently, the House Interior Committee proposed extensive amendments to the original legislation, but even the original bill proposed by the House, H.R. 12533, contained a single definition of "child custody proceeding." Only in the final bill, written subsequent to the

House hearings, were the four types of child custody proceedings named and defined. H.R. Rep. No. 95-1386, 95th Cong., 2d Sess. 19-20 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 7530, 7542.

Testimony before the House Subcommittee on Indian Affairs on the Senate bill showed a pattern of concern that a parent's voluntary decision to relinquish custody and her right to privacy in that decision should not be infringed upon. See, e.g., Indian Child Welfare Act: House Hearings on S. 1214 (P. 54-55, Testimony of Rich Lavis, Assistant Secretary of Indian Affairs, on the mother's right to privacy off the reservation; P. 63, testimony of Chief Calvin Isaac, Mississippi Band of Choctaw Indians, calling for notice to the tribe in all cases, but intervention only with the consent of the natural parents; P. 94,

testimony of Don Mitchell of RuralCAP, to the effect that confidentiality in a small Alaska Village is most likely unobtainable with or without notice; P. 143, testimony by Mary Jane Fales, from the North American Center of Adoption, arguing that it would invade the privacy of parents living off the reservation to have to notify the tribe).

Of particular relevance is the testimony of Sister Mary Clare of Alaska Catholic Social Services, objecting to those sections of the Senate bill requiring notice to the tribe in voluntary relinquishments:

> Confidentiality.
>
> The very nature of Section 102 and 103 make the personal lives of the natural parents totally open to the view of their village and family no matter what their relationship with village and family is. In most cases we are dealing with a single mother. If the girl is older and living away from her family she may not wish them to know. If she is young the

> family usually wishes to keep the matter private. Under this bill those wishes would be completely disregarded.
>
> For obvious reasons the single mother is passing through a difficult time. She must first decide whether to allow her baby to be born at all and then whether to keep it. All of this usually takes place without the presence or interest of the natural father. To expose this girl to her family and village against her will would be tragedy. Moreover if the girl decides on adoption confidentiality between her and the adoptive parents should be preserved in her interest as well as the child's.

(CR 150-151.) Sister Mary Clare also submitted a written section-by-section analysis:

> 10. Section 102(c), P. 12, lines 1-15. In a voluntary placement the tribe should not be notified over the objections of the natural parents. Such a notice would be a serious breach of confidentiality which is a vital principle in adoption work.

(CR 156,.) See also oral testimony of Sister Mary Clare, House Hearings on S. 1214, P. 85-90.

It is therefore clear that Congress was aware of the issue of notice to tribes and had it in mind when the final bill was drafted. The original bill provided for notice to the tribe and tribal right to intervention in all child placement proceedings. The final bill distinguished between voluntary and involuntary termination proceedings, and provided for notice only in the latter. These changes were made in direct response to testimonial entreaties to respect parental privacy in voluntary relinquishments. Essentially, C.A.A. and Cook Inlet Tribal Council are asking the court to substitute its judgment for that of Congress in a statutory scheme created by Congress. One of the parties to this case spoke on the bill before the House Committee twelve

years ago. The changes requested by Catholic Social Services were made. If the statute is to be changed now, it should be changed by Congress, not the courts. The requirements of the Act must be read as Congress intended.

III

ALASKA SUPREME COURT DECISION IS CONSISTENT WITH NATIONAL BIA INTERPRETATION AND THE RULINGS OF OTHER COURTS

Following enactment of the Indian Child Welfare Act, the Bureau of Indian Affairs published guidelines for state courts in Indian child custody proceedings. 44 Fed. Reg. 67584-94 (1979). While these regulations do not have binding legislative effect, they represent the interpretation of the Department of Interior and are considered instructive. 44 Fed. Reg. 67584 (1979); D.E.D v. State, 704 P.2d at 779, n. 8.

These guidelines make it clear that a parent's right to confidentiality must prevail in voluntary proceedings.

The regulations provide in part:

> B.1. Determination That Child is an Indian. (a) When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe. In a voluntary placement proceeding where a consenting parent evidences the desire for anonymity, the court shall make its inquiry in a manner that will not cause the parent's identity to become publicly known.

The commentary accompanying this guideline explains:

> Under the Act, confidentiality is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings <u>but not in voluntary ones</u>. C. 25 U.S.C. § 1912 with 25 U.S.C. § 1913. For voluntary placements, however, <u>the Act specifically directs state courts to respect parental requests for confidentiality</u>. 25 U.S.S. § 1915(c). The most common voluntary placement involves a newborn infant. Confidentiality has traditionally been a high priority in such

> placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones. This guideline specifically provides that anonymity not be compromised in seeking verification of Indian status. If anonymity were compromised at that point, the statutory requirement that requests for anonymity be respected in applying the preferences would be meaningless. (emphasis added)

44 Fed. Reg. 67586.

In section 1915, establishment of the preference order for placement is an indication that Congress intended the exact opposite. The proviso of subsection (c) of Section 1915 states:

> . . . where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

While some state statutes and local practices may allow or require notice under state law, no court has held that notice is required under federal law. In fact, Duncan v. Wiley, 657 P.2d at 1213, cited by petitioners, specifically holds

the opposite. The Oklahoma court stated at 1213:

> The Indian Child Welfare Act of 1978 attempts to protect the rights of Indian children and to promote tribal stability by establishing minimum federal standards from removal of Indian children from the family unit. 25 U.S.C. Sec. 1902. As part of this plan, notice of pending involuntary state court proceedings must be given the parents or Indian custodian and the tribe. 25 U.S.C. Sec. 1912.
>
> The notice requirements of Sec. 1912 are mandatory in involuntary actions. The requirements do not apply to voluntary court proceedings such as the guardianship action involving the Duncan boys. Instead, the Act provides strict procedures for a parent's or Indian custodian's voluntary relinquishment of custody. (Emphasis added.)

IV

DUE PROCESS DOES NOT REQUIRE NOTICE

Congress created the Indian Child Welfare Act. Prior to the Act no rights, constitutional or otherwise, existed for tribes in adoption proceedings. These

rights have been statutorily created after extensive Congressional hearings. Congress was entitled to balance the interests of tribes versus the interests of Indian parents. Where these conflicted, Congress legitimately provided protection for Indian parents.

Congress recognized that tribal rights do not carry the same weight in voluntary proceedings that they take in involuntary proceedings. In voluntary matters, the natural parent's request for anonymity is entitled to consideration. See § 1915(c); 44 Fed. Reg. 67586, 67594. Where the natural mother has determined that it is in the best interest of both herself and her child that she relinquish her parental rights, and where a court has assured itself that her decision was made voluntarily, the mother's judgment on this difficult and highly personal issue should not be subject to review by the tribe.

Although the tribe may be able to step in with a range of social services directed to the goal of keeping the family together, the natural mother should be free to reject that route and to handle this difficult situation as she sees fit.

The master here found that there was no constitutional right to notice in this context as argued by the tribe:

> While the tribe has an interest in its members, this interest is not so fundamental as to require notice of an Indian parent's confidential voluntary relinquishment hearing. The tribe has provided no authority either directly or by analogy to support its due process argument.

(CR 208.) While the tribe has an important interest in its members generally, its interest in voluntary relinquishment proceedings is not so "fundamental" as to invoke the protections of the due process clause. This is especially true where the relationship

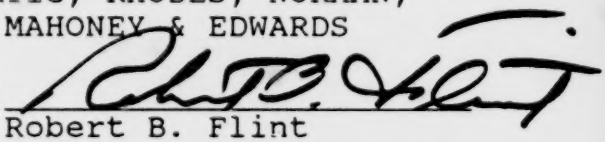
between the parent and the tribe is so attenuated that the tribe is unaware of the relinquishment without formal notice. Notice to the tribe in this case would override the substantial rights of the natural mother to privacy and confidentiality. Congress considered this problem before it enacted the Indian Child Welfare Act, and determined that the balance should be struck in favor of confidentiality in the case of voluntary proceedings. Given this Congressional determination, it would be anomalous to hold that the Act has accidentally created an interest so constitutionally "fundamental" as to require notice to the tribe.

CONCLUSION

Notice of the tribe is not required by the Indian Child Welfare Act nor the due process requirements of the Constitution. The decision of the Alaska

Supreme Court is not in conflict with Mississippi Choctaw, a jurisdiction case involving a question of domicile not present here. It is therefore respectfuly submitted that the Petition for a Writ of Certiorari be denied.

HARTIG, RHODES, NORMAN,
MAHONEY & EDWARDS

By: 
Robert B. Flint
Attorneys for Respondents
Catholic Social Services,
Inc., C.G. and S.G.

717 K Street
Anchorage, Alaska 99501

Dated April 24, 1990

APPENDIX

APPENDIX

INDIAN CHILD WELFARE ACT OF 1978
(EXCERPT)
TITLE 25, UNITED STATES CODE

Section 1912: Pending Court Proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation. In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice

shall be given to the Secretary in like matter, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.